

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

CHAPTER Env-Sw 1400 FINANCIAL ASSURANCE

Statutory Authority: RSA 149-M:7

PART Env-Sw 1401 PURPOSE AND APPLICABILITY

Env-Sw 1401.01 Purpose. The purpose of the rules in this chapter is to identify requirements and procedures for providing and maintaining a financial assurance plan to guarantee the cost of closing a facility and, for a facility subject to 40 CFR 258.58, the cost of corrective action.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05 (formerly Env-Wm 3101.01)

Env-Sw 1401.02 Applicability.

(a) The rules in this chapter shall apply to all facilities, except as provided by (b) below.

(b) The rules in this chapter shall not apply to a:

- (1) Permit-exempt facility;
- (2) Permit-by-notification facility;
- (3) Facility for which the closure cost estimate, prepared in accordance with Env-Sw 1403.02, is \$3,000 or less;
- (4) Emergency permit facility; or
- (5) Limited private non-landfill facility.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05 (formerly Env-Wm 3101.02)

PART Env-Sw 1402 DEFINITIONS

Env-Sw 1402.01 “Binding commitment” means a signed loan agreement between the permittee and the state of New Hampshire and approved by the governor and council.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05 (formerly Env-Wm 3102.01)

Env-Sw 1402.02 “Debt service” means the amount of principal and interest due on a loan in the current year.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05 (formerly Env-Wm 3102.02)

Env-Sw 1402.03 “Deficit” means a negative balance calculated by taking the beginning fund balance plus annual revenue minus total annual expenditures.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05 (formerly Env-Wm 3102.03)

Env-Sw 1402.04 “Local government” means a legally-recognized political subdivision in the state of New Hampshire, including solid waste districts, whose revenue is generated by the same voters as are responsible for the closure of the regulated municipal solid waste landfill facility.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3102.04)

Env-Sw 1402.05 “Total revenues” means proceeds from all taxes and fees collected by the local government responsible for landfill closure, but does not include the proceeds from borrowing or asset sales or proceeds earned from funds managed by local government on behalf of a specific third party.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3102.05)

PART Env-Sw 1403 FINANCIAL ASSURANCE REQUIREMENTS

Env-Sw 1403.01 Financial Assurance Plan.

(a) A permittee shall establish, implement and maintain an approved financial assurance plan to guarantee the cost of facility closure.

(b) A financial assurance plan shall include:

- (1) A closure cost estimate prepared in accordance with Env-Sw 1403.02;
- (2) Provisions for guaranteeing the cost of facility closure based on one or any combination of the options specified in Env-Sw 1403.03 through Env-Sw 1403.06;
- (3) For the options specified in Env-Sw 1403.03, the identity of the financial institution providing the guarantee; and
- (4) For a local government proposing to use the state approved financial test to assure its obligations, as provided in Env-Sw 1403.03:
 - a. A letter signed by the local government’s chief financial officer which:
 1. Identifies all current cost estimates covered by a financial test, as described in Env-Sw 1403.05; and
 2. Provides evidence of and certifies that the local government meets the conditions of Env-Sw 1403.05(a) through (h);
 - b. The local government’s year-end financial statements for the latest fiscal year, audited by an independent, certified public accountant (CPA) who conducts comprehensive audits, with:
 1. The unqualified opinion of the auditor; or
 2. The qualified opinion of and a written explanation by the auditor as to why the qualification should be deemed insufficient to warrant disallowance of the financial test;
 - c. A report to the local government by the local government’s independent CPA, as follows:
 1. The report shall be based on performing a review of the financial ratios required by Env-Sw 1403.05(a)(3), if applicable, and the requirements of Env-Sw 1403.05(b) and Env-Sw 1403.05(c)(3) and (4); and
 2. The report shall state the procedures performed and the CPA’s findings; and

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

d. A copy of the comprehensive annual financial report (CAFR) used to comply with Env-Sw 1403.05(d) or certification that the requirements of Governmental Accounting Standards Board Statement 18, No. 101-A, published August, 1993 have been met.

(c) A proposed financial assurance plan shall be:

- (1) Submitted by the permittee in accordance with Env-Sw 303; and
- (2) Reviewed and approved by the department pursuant to Env-Sw 1404.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3103.01)

Env-Sw 1403.02 Closure Cost Estimation.

(a) The dollar amount guaranteed by a financial assurance plan shall be no less than the estimated total closure costs determined pursuant to (b) through (g) below.

(b) The closure cost estimate shall be figured based on representative current market rates for having a third party perform all required closure and post-closure activities at the point in the facility's active life when the extent and manner of facility operations in compliance with permit conditions and applicable laws and rules makes closure the most expensive, as indicated by the approved facility closure plan.

(c) For a landfill constructed in phases, the permittee may figure closure costs in accordance with (b) above based on the constructed area of the facility only, instead of the entire permitted footprint.

(d) Any facility subject to the corrective action requirements specified in 40 CFR 258.58, shall comply with the financial assurance requirements specified in 40 CFR 258, Subpart G.

(e) The cost of removing and disposing of all wastes not permitted to remain at the facility following closure shall be included in the closure cost estimate, excluding actively managed select processed recyclable materials.

(f) Salvage value from the sale of facility structures, equipment or other assets associated with the facility and profits from the sale of recyclable materials shall not be treated as a credit to reduce total closure costs.

(g) The closure cost estimate shall:

- (1) Be itemized and documented to show the unit cost and quantity of each item, service, and activity required to close the facility in accordance with the solid waste rules and the approved facility closure plan;
- (2) Include a line item for contingencies equaling no less than 10% of the total itemized costs;
- (3) For landfills, include the following costs if final design plans and specifications for landfill closure are not yet approved, include a line item for:
 - a. The cost of preparing final design plans and specifications for closure; and
 - b. The cost of the fee specified in Env-Sw 310.08(b) for filing an application for a type II permit modification to obtain final design plan approval for construction of all required landfill closure systems; and
- (4) For landfills, be certified by a qualified professional engineer.

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3103.02)

Env-Sw 1403.03 Financial Assurance Mechanisms, All Facilities.

(a) Financial assurance shall be provided in one, or any combination, of the following forms:

- (1) An irrevocable letter of credit issued for a period of at least one year from an institution whose operations are regulated and examined by a federal or New Hampshire state agency;
- (2) An insurance policy, except that insurance issued by an affiliated captive insurance company shall not be acceptable;
- (3) A surety bond, issued by a surety company listed as an acceptable surety on federal bonds in Circular 570 of the U.S. Department of the Treasury;
- (4) A trust fund established in accordance with the laws of the state of New Hampshire;
- (5) For a landfill, a binding commitment between the permittee and the state of New Hampshire for a state revolving fund loan designated for closure of the landfill; or
- (6) Another mechanism that meets the criteria provided in 40 CFR 258.74(i).

(b) If using a surety bond, insurance policy or letter of credit, the permittee shall also establish a standby trust to receive the proceeds of the surety bond, insurance policy or letter of credit.

(c) Each financial assurance instrument specified in (a) and (b) above, except (a)(5), shall specifically identify the state of New Hampshire as the beneficiary.

(d) Funds held in trust accounts may be invested, but shall provide for the preservation of principal.

(e) Financial assurance documents, including a standby trust, shall be as specified by 40 CFR 264.151, with the following revisions:

- (1) The phrase “hazardous waste” shall be replaced with the phrase “solid waste”;
- (2) The phrase “EPA administrator” shall be replaced with the phrase “department on behalf of the state of New Hampshire”;
- (3) All cites to “40 CFR” shall be replaced with “RSA 149-M and the solid waste rules”; and
- (4) The term “RCRA C” shall be omitted.

(f) Letters of credit shall include a provision to automatically extend the expiration date by at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies the permittee and the department by certified mail, return receipt requested, of a decision to not extend the expiration date.

(g) Insurance policies and surety bonds shall include a provision to prohibit any cancellation without prior notice of cancellation being sent to the permittee and the department by certified mail, return receipt requested, at least 120 days before the effective date of cancellation.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3103.03)

Env-Sw 1403.04 Financial Assurance Mechanisms, Public Facilities.

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

- (a) A public facility not subject to 40 CFR 258 shall provide proof of financial assurance:
- (1) In accordance with Env-Sw 1403.03; or
 - (2) Through an alternative comprehensive plan which guarantees that all funds for the estimated facility closure costs shall be readily available for closure activities.
- (b) A public facility subject to 40 CFR 258 shall provide proof of financial assurance using:
- (1) The mechanisms identified in Env-Sw 1403.03;
 - (2) The local government financial test specified in Env-Sw 1403.05, if qualified pursuant to (c) below; or
 - (3) The local government guarantee specified in Env-Sw 1403.06 if qualified pursuant to (c) below.
- (c) A public facility shall be qualified to use a financial assurance mechanism specified in Env-Sw 1403.05 and Env-Sw 1403.06 if the facility is qualified for the state 20% landfill closure grant program as determined in accordance with Env-Sw 1300.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3103.04)

Env-Sw 1403.05 Local Government Financial Test.

- (a) A local government proposing to assure its obligations under the state approved local government financial test shall meet the following requirements as applicable:
- (1) If the local government has outstanding, rated, general obligation bonds not secured by insurance, a letter of credit, or other collateral or guarantee, all such general obligation bonds shall have a current rating of Aaa, Aa, A, or Baa, as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's;
 - (2) The local government shall be included in an outstanding bond issue through the New Hampshire municipal bond bank and shall not be in default; or
 - (3) The local government shall satisfy each of the following financial ratios based on the local government's most recent audited annual financial statement:
 - a. The ratio of cash plus marketable securities to total expenditures shall be greater than or equal to 0.05, using available cash and marketable securities held by the local government on the last day of the fiscal year, excluding cash and marketable securities designated to satisfy past obligations or special purposes other than landfill closure such as pensions and capital reserve funds not held for landfill closure purposes; and
 - b. The ratio of annual debt service to total expenditures shall be less than or equal to 0.20, where total expenditures shall exclude capital outlays, debt repayment, capital reserve funds not expended for landfill closure purposes, trust funds, and pension funds.
- (b) The local government proposing to assure its obligations under the state approved local government financial assurance test shall:
- (1) Prepare its financial statements in conformity with generally accepted accounting principles for governments; and

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

(2) Have its financial statements audited by an independent certified public accountant.

(c) A local government shall not be eligible to assure its obligations under the state approved local government financial test if it:

(1) Is currently in default on any outstanding general obligation bonds or outstanding bonds with the New Hampshire municipal bond bank;

(2) Has any outstanding general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's;

(3) Operated at a deficit equal to 5% or more of total annual revenue in each of the past 2 fiscal years; or

(4) Receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant auditing its financial statement and negatively impacting the current financial position of the local government.

(d) A local government shall disclose in each comprehensive annual financial report (CAFR) all closure and post-closure care costs and corrective action costs, if any, which the local government has assured through the financial test provisions in 40 CFR 258.50.

(e) Disclosure pursuant to (d) above shall include:

(1) The nature and source of the closure and post-closure care requirements;

(2) The reported liability at the balance sheet date;

(3) The estimated total closure and post-closure care cost remaining to be recognized;

(4) The percentage of landfill capacity used to date; and

(5) The estimated landfill life in years.

(f) Conformance with Governmental Accounting Standards Board Statement 18, No. 101-A, published August, 1993 shall be deemed in compliance with (d) above.

(g) Subject to (h) below, a local government may use the state approved local financial assurance test to assure closure, post-closure, and corrective action costs that equal up to 43% of the local government's total annual revenue.

(h) If the local government assures other environmental obligations through a financial test, including those associated with underground injection control wells (UIC) facilities under 40 CFR 144.62, petroleum underground storage tank facilities under 40 CFR 280, polychlorinated biphenyls (PCB) storage facilities under 40 CFR 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR 264 and 265, it shall:

(1) Add those costs to the closure, post-closure, and corrective action costs it seeks to assure through use of the state approved local financial test; and

(2) Assure that the total shall not exceed 43% of the local government's total annual revenue.

(i) A local government shall obtain an alternate financial assurance instrument as specified in Env-Sw 1403.03 or Env-Sw 1403.06 for those costs that exceed the limits set in (g) and (h) above.

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3103.05)

Env-Sw 1403.06 Local Government Guarantee.

(a) For a facility meeting the requirements of Env-Sw 1403.04(c), a local government may assure its obligations by obtaining a written guarantee provided by a guarantor pursuant to (b) below.

(b) The guarantor shall be a political subdivision in New Hampshire and comply with the terms of the written guarantee.

(c) The guarantee shall:

(1) Provide that if the permittee fails to perform closure, post-closure care, or corrective action for a facility covered by the guarantee, the guarantor shall:

a. Perform, or pay a third party to perform, closure, post-closure care, or corrective action as required; or

b. Establish a fully-funded trust fund as specified in 40 CFR 258.74(a) identifying the state of New Hampshire as the intended beneficiary and established in accordance with the laws of the state of New Hampshire;

(2) Include provisions specifying that the guarantee shall remain in force until the earlier of the following dates:

a. 120 days following the receipt date of a written notice of cancellation sent by certified mail, return receipt requested to the local government and to the department; or

b. The date the local government implements an approved financial assurance replacement pursuant to Env-Sw 1405.03; and

(3) Include a provision specifying that if the guarantor ceases to meet the requirements in Env-Sw 1403.05, the guarantor shall provide alternate assurance for the duration of the agreement.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3103.06)

PART Env-Sw 1404 REVIEW AND APPROVAL

Env-Sw 1404.01 Review. The department shall review a proposal for financial assurance as part of the permit application or closure plan review process, as applicable.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3104.01)

Env-Sw 1404.02 Approval. A proposal for financial assurance shall not be approved if the department determines that the proposal does not:

(a) Meet the requirements for financial assurance specified in this part; or

(b) Satisfy the requirements of RSA 149-M:9, X.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3104.02)

PART Env-Sw 1405 ADJUSTMENTS AND CHANGES

Env-Sw 1405.01 Modifications.

(a) Any proposal to change an approved financial assurance plan shall be submitted to the department as an application for a type II permit modification pursuant to the provisions of Env-Sw 315.

(b) Applications to modify an approved financial assurance plan shall include all of the information required by Env-Sw 1404.01.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3105.01)

Env-Sw 1405.02 Annual Updates.

(a) A permittee shall submit an annual update of the facility's closure cost estimate to the department no later than the anniversary of the permit issue date or an alternative date agreed upon by the department and the permittee in writing.

(b) The financial assurance mechanism shall be updated in an amount consistent with the most current closure cost estimate.

(c) A local government using either of the mechanisms in Env-Sw 1403.05 or Env-Sw 1403.06 shall submit documentation required in Env-Sw 1403.01(b)(4) annually within 180 days following the close of the local government's fiscal year.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3105.02)

Env-Sw 1405.03 Replacement.

(a) A permittee shall submit a revised financial assurance plan for approval pursuant to Env-Sw 1405.01 within 30 days of learning that any portion of its financial assurance shall be canceled or not renewed by the issuer.

(b) The permittee shall demonstrate that it has obtained replacement financial assurance promptly upon receiving the department's approval of a revised plan, but no later than 30 days before the cancellation or expiration date of the existing financial assurance.

(c) A local government using the state approved local government financial test to assure its obligations shall satisfy the requirements of the financial test at the close of each fiscal year. If the local government no longer meets the requirements of the local government financial test it shall, within 210 days following the close of the local government's fiscal year, obtain alternative financial assurance as specified in Env-Sw 1403.03.

Source. #6619-B, eff 10-29-97; ss by #8459, eff 10-28-05
(formerly Env-Wm 3105.03)

Appendix

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

Rule Sections	Statute(s) Being Implemented
Env-Sw 1400	RSA 149-M:7, XV; RSA 149-M:9, X